

**New York State Department of Taxation and Finance**  
**Office of Tax Policy Analysis**  
**Technical Services Division**

TSB-A-01(8)S  
Sales Tax  
February 27, 2001

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S980901A

On September 1, 1998, the Department of Taxation and Finance received a Petition for Advisory Opinion from Motion Systems Corporation, 600 Industrial Way West, Eatontown, New Jersey 07724.

The issue raised by Petitioner is whether a corporation located and operated solely in New Jersey needs to register with New York State as a sales tax vendor.

Petitioner submits the following facts as the basis for this Advisory Opinion.

Petitioner is a manufacturer of linear actuators, and is located and operates solely at its facility in Eatontown, New Jersey. Petitioner's product is not sold at retail outlets. The product is sold and shipped to other manufacturers for incorporation into machinery or equipment which are then sold by those manufacturers to the ultimate consumer. Petitioner also sells its actuator to manufacturers who wish to test the product's performance in connection with the product they are manufacturing to determine whether the actuator is compatible with their product, before actually installing the product into their machinery or equipment which will later be sold.

Petitioner does sell and ship, by common carrier, a limited amount of its product to manufacturers located in New York. Contact between Petitioner and manufacturers occurs almost exclusively by means of telephone, or electronic or written communication made directly from the manufacturers to Petitioner's office in New Jersey. Petitioner also sells and ships its product to manufacturers in all states and approximately ten foreign countries. Petitioner does not distribute catalogs or other advertising matter in New York, but does advertise in a trade publication circulated in New York. Petitioner does not participate in trade shows in New York.

Petitioner utilizes an independent manufacturer representative located in New York to personally appear at New York manufacturers' offices to troubleshoot inquiries or explain Petitioner's product. The services consist of possibly a personal call on a potential or existing customer every four to six months. A substantial portion of the money Petitioner pays to the representative is for commissions for referrals of long-time customers. The vast majority of customer contact and solicitation is done, however, through telephone or fax contact from Petitioner's New Jersey office.

**Applicable Laws and Regulations**

Section 1101(b) of the Tax Law provides, in part:

(b) When used in this article for the purposes of the taxes imposed by subdivisions (a), (b), (c) and (d) of section eleven hundred five and by section eleven hundred ten, the following terms shall mean:

(4) Retail sale. (i) A sale of tangible personal property to any person for any purpose, other than (A) for resale as such or as a physical component part of tangible personal property . . .

\* \* \*

(8) Vendor. (i) The term "vendor" includes:

(A) A person making sales of tangible personal property or services, the receipts from which are taxed by this article;

(B) A person maintaining a place of business in the state and making sales, whether at such place of business or elsewhere, to persons within the state of tangible personal property or services, the use of which is taxed by this article;

(C) A person who solicits business either:

(I) by employees, independent contractors, agents or other representatives;  
or

(II) by distribution of catalogs or other advertising matter, without regard to whether such distribution is the result of regular or systematic solicitation, if such person has some additional connection with the state which satisfies the nexus requirement of the United States constitution;

and by reason thereof makes sales to persons within the state of tangible personal property or services, the use of which is taxed by this article;

(D) A person who makes sales of tangible personal property or services, the use of which is taxed by this article, and who regularly or systematically delivers such property or services in this state by means other than the United States mail or common carrier....

Section 1131(1) of the Tax Law provides, in part:

"Persons required to collect tax" or "person required to collect any tax imposed by this article" shall include: every vendor of tangible personal property or services; every recipient of amusement charges; and every operator of a hotel. . . .

Section 1134(a)(1) of the Tax Law provides, in part:

(i) Every person required to collect any tax imposed by this article ... commencing business or opening a new place of business, (ii) every person purchasing or selling tangible personal property for resale commencing business or opening a new place of business ... shall file with the commissioner a certificate of registration, in a form prescribed by the commissioner, at least twenty days prior to commencing business or opening a new place of business ....

Section 526.6(c) of the New York State Sales and Use Tax Regulations provides:

Resale exclusion. (1) Where a person, in the course of his business operations, purchases tangible personal property or services which he intends to sell, either in the form in which purchased, or as a component part of other property or services, the property or services which he has purchased will be considered as purchased for resale, and therefore not subject to tax until he has transferred the property to his customer.

Section 526.10(a)(4) of the New York State Sales and Use Tax Regulations provides, in part:

(i) A person who solicits business by the distribution of catalogs or other advertising matter, without regard to whether such distribution is the result of regular or systematic solicitation, if such person has some additional connection with the State which satisfies the nexus requirement of the United States Constitution and by reason thereof makes sales to persons within the State of tangible personal property or services the use of which is subject to tax, is a vendor.

(ii) For purposes of subparagraph (i) of this paragraph, the additional connection with the State a person may have in order to qualify as a vendor shall include, but not be limited to:

\* \* \*

(b) the presence of traveling sales representatives in the State;

(c) the presence of employees, independent contractors or agents in the State;

(d) the presence of service representatives in the State....

Section 533.3(d) of the Sales and Use Tax Regulations provides, in part:

*Annual return.* (1) Every person required to register with the Department of Taxation and Finance (see section 533.1 of this Part and Parts 539 and 540 of this Title) only because such person is purchasing or selling tangible personal property for resale, and who is not required to collect any tax or pay any tax directly to the

Department of Taxation and Finance, must file a return annually in accordance with the schedule provided in paragraph (4) of this subdivision.

(2) Any person required to file quarterly returns whose total tax due for the four most recent quarterly periods for which data is available for such person within the most recent six quarters for which data is available did not exceed \$3,000, may be notified by the department or may elect to file returns annually in lieu of quarterly.

\* \* \*

(4) An annual return is to be filed in accordance with the following schedule.

(i) Annual filers for years commencing on or after June 1, 1998, including those persons who are not required to collect any tax or pay any tax directly to the department, shall file their returns:

(a) For the short annual period of nine months beginning June 1, 1998, and ending on February 28, 1999, on or before March 20, 1999.

(b) For annual periods beginning on or after March 1, 1999, which annual periods shall begin on March 1<sup>st</sup> and end with the last day of February in the subsequent year, on or before March 20<sup>th</sup> of each such subsequent year.

(ii) Quarterly filers who are notified by the department that they shall file annually must file annual returns (unless they timely notify the department in accordance with subparagraph [3][ii] of this subdivision that they wish to continue filing quarterly returns) as follows:

(a) For the short annual period of nine months beginning June 1, 1998, and ending on February 28, 1999, on or before March 20, 1999.

(b) For annual periods beginning on or after March 1, 1999, the annual period shall begin on March 1<sup>st</sup> and end with the last day of February in the subsequent year, with the annual return being due on or before March 20<sup>th</sup> of each such subsequent year.

(c) Quarterly filers who become annual filers shall file their last quarterly return for the quarterly period which ends immediately prior to the date on which the annual period begins and in accordance with instructions provided in the notification issued pursuant to paragraph (3) of this subdivision and in accordance with such other applicable instructions. Annual returns must then be filed for subsequent annual periods succeeding this last quarterly period.

(5) A properly completed annual return is to be prepared in accordance with the instructions provided by the Department of Taxation and Finance. It must include completed schedules, if required, and must show:

(i) the name, address and identification number of the vendor, recipient of amusement charges, or operator of a hotel;

(ii) gross amount, to the nearest whole dollar, of sales of tangible personal property and services, food and drink, amusement charges, and rents;

(iii) amount, to the nearest whole dollar, of taxable sales of tangible personal property and services, food and drink, amusement charges and rents for each jurisdiction, and totals of all jurisdictions;

(iv) amount, to the nearest whole dollar, of purchases subject to use tax, for each jurisdiction, and totals of all jurisdictions;

(v) amount of sales and use taxes for each jurisdiction, and totals of all jurisdictions;

(vi) credits claimed and prepayments, if any;

(vii) sales and use taxes due;

(viii) late filing charge, penalties and interest, if any, and total amount due;

(ix) the signature of the vendor, officer or employee of the vendor signing the return and the individual's title;

(x) the signature and address of a preparer, if other than the vendor; and

(xi) the date prepared.

(6) If, at any time during the course of the annual periods described in paragraph (4) of this subdivision, the total tax due from a person required to file returns is in excess of \$3,000, such person must commence filing a quarterly or monthly return as required by section 1136 of the Tax Law and the preceding provisions of this section. On the first quarterly return so required, such person must report and pay any tax due for the period commencing with the beginning of the abridged annual period. Failure to do so may result in penalty and interest being charged from the date a quarterly or monthly return should have been filed.

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**Opinion**

In this case, Petitioner manufactures linear actuators at its facility in Eatontown, New Jersey. Petitioner's product is not sold at retail outlets. The product is solely sold and shipped to other manufacturers for incorporation into machinery or equipment which is then sold by those manufacturers to the ultimate consumer. Petitioner utilizes an independent manufacturer representative located in New York to personally appear at New York manufacturers' offices to troubleshoot inquiries or explain Petitioner's product. The services consist of a personal call on a potential or existing customer every four to six months.

Under Section 1101(b)(8)(i)(C)(I) of the New York State Tax Law and Section 526.10 of the New York State Sales and Use Tax Regulations, since Petitioner, an out-of-state corporation, is soliciting business in New York by means of an independent manufacturer's representative, Petitioner has nexus and is a vendor required to register under Section 1134 of the Tax Law. Therefore, Petitioner will be required to collect and remit sales and use tax on retail sales of the linear actuator to persons in New York. It should be noted, however, that where Petitioner's customers are purchasing the linear actuator for resale, as such, or as a physical component part of machinery or equipment which will later be sold by the customer, the actuator may be purchased for resale. Therefore, in such instances, the sales by Petitioner of the actuator will not be subject to sales tax. See Section 1101(b)(4)(i) of the Tax Law and Section 526.6(c) of the Sales and Use Tax Regulations. The purchase of an actuator for the purpose of testing its performance in connection with the product the purchaser is manufacturing is not deemed to be a purchase for resale, but is considered a retail sale. It is noted, though, that tangible personal property purchased for use or consumption directly and predominantly in the development of new products or improvement of existing products may qualify for the exemption under Section 1115(a)(10) of the Tax Law as property used directly and predominantly in research and development. See Section 528.11 of the Sales and Use Tax Regulations. Petitioner will not be required to collect sales and use tax where it accepts in good faith a properly completed resale or exemption certificate within 90 days of the date of sale. See Section 1132(c) of the Tax Law and Section 532.4 of the Sales and Use Tax Regulations.

Presuming Petitioner's total tax due from the retail sales of the linear actuator for the past four most recent quarterly periods did not exceed \$3,000, Petitioner may elect to file an annual return under Section 533.3(d) of the Sales and Use Tax Regulations.

DATED: February 27, 2001

/s/  
Jonathan Pessen  
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Technical Services Division

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.